157-281

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 889.

THE UNITED STATES, APPELLANT,

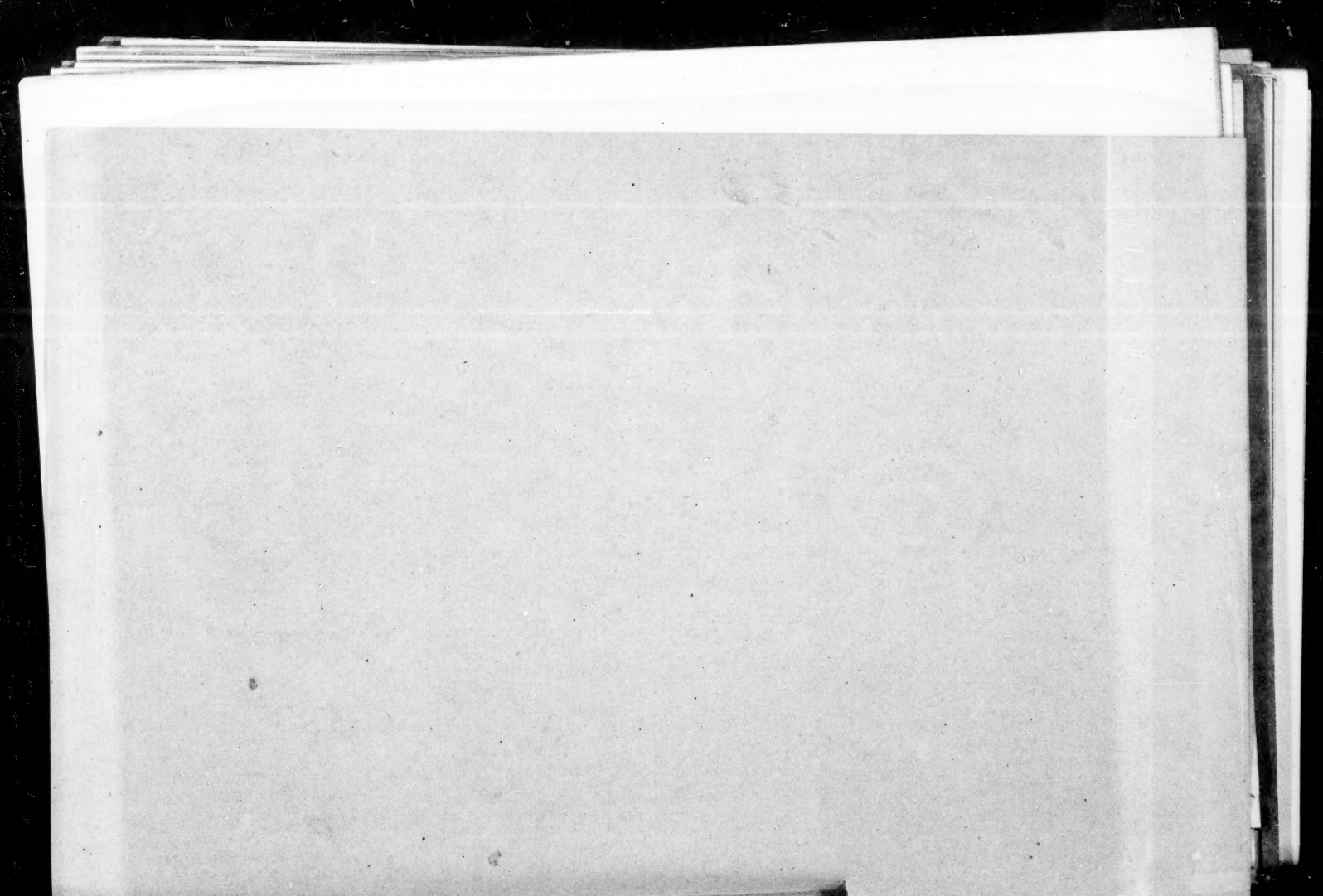
vs.

EUGENIA R. SWEENEY, ADMINISTRATRIX OF THOMAS W. SWEENEY, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 16, 1895.

(15773.)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 889.

THE UNITED STATES, APPELLANT,

vs.

EUGENIA R. SWEENEY, ADMINISTRATRIX OF THOMAS W. SWEENEY, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition	1	1
Motion suggesting death of claimant, and substitution of administratrix, and allowance of same	4	2
Statement of clerk	5	2
Traverse	6	3
Findings of fact and conclusion of law	7	3
Judgment of the court	14	7
Application for and allowance of appeal	15	7
Certificate of clerk	16	8

11962

1 In the Court of Claims.

THOMAS W. SWEENEY
vs.
THE UNITED STATES. } 17404.

I.—*Petition. Filed February* 23, 1892.

To the Honorable Chief Justice and Judges of the Court of Claims:

Your petitioner, Thomas W. Sweeny, respectfully represents that he is a citizen of the United States and an officer of the United States Army, at present holding the position of brigadier-general on the retired list thereof; that from the 23d day of November, 1846, till now he has almost continuously held the position of a commissioned officer in said army and served therein, fully and faithfully performing the duties of the said position; that in the month of January, 1892, he received a communication purporting to be from the War Department, U. S. A., as follows, to wit:

Subject: Stoppage of pay.

WAR DEPARTMENT,
PAYMASTER-GENERAL'S OFFICE,
Washington, D. C., Jan'y 4th, 1892.

THOMAS W. SWEENY,
Brig. Gen'l, U. S. Army, Retired, Astoria, N. Y.:

2 In accordance with sec. 1766 of the Revised Statutes the Second Comptroller of the Treasury reports that from settlement No. 1050 confirmed by his office Dec. 24, 1891, it appears that you are in arrears to the United States in the sum of one hundred and eighty-two and $\frac{05}{100}$ dollars, ($182.05). You will therefore please turn over the above amount to a paymaster and forward his receipt to reach this office prior to February 16, 1892.

Very respectfully,

WM. SMITH,
Paymaster-General, U. S. A.

That soon after the receipt by him of said communication, and upon the 1st day of February, 1892, he paid $182.05, for the use of the United States, to a paymaster thereof, and took a receipt for the same in the words and figures as follows:

PAY DEPARTMENT, U. S. ARMY,
New York, February 1st, 1892.

Received of Brigadier-General T. W. Sweeny, U. S. A., one hundred and eighty-two dollars and five cents, being on account of stoppage, per letter from Paymaster-General dated January 4, 1892 (this payment is made under protest to avoid a stoppage of his pay, General Sweeny believing himself not indebted to the United States), which sum I have passed to the credit of the United States and hold myself accountable therefor at the Treasury.

$182.05.

RODNEY SMITH,
Asst. Paymaster-Gen'l, U. S. Army.

That, as stated in said receipt, he so paid the said sum of money under protest, and not believing he was in arrears to the United States; that he is not in arrears to the United States, and further, that he is advised by his counsel that he is not indebted to the United States in any sum whatever; and that on the other hand the United States are, and were then, indebted to him in the sum of several hundred dollars; and your
3 petitioner further says that no consideration has moved from, or been given by, the United States to him for the said sum of $182.05, had and received by them as aforesaid.

Wherefore your petitioner demands judgment against the United States for one hundred and eighty-two dollars and five cents ($182.05), with interest thereon from the first day of February, 1892, and asks for such other and further relief as may be just and equitable.

JOSEPH W. STRYKER,
Attorney for Claimant.

UNITED STATES OF AMERICA,
State of New York, County of Queens, ss:

Petitioner, Thomas W. Sweeny, being duly sworn, says that he has read the foregoing petition and believes the averments therein contained are true.

T. W. SWEENY,
Brigadier-General, U. S. A.

Sworn to and subscribed before me this 17th day of February, 1892, at Long Island City, Queens County, as witness my hand and official seal.

[SEAL.] WALTER G. SCOTT,
Notary Public, Queens Co.

4 II.—*Motion to substitute administratrix filed November 2, 1892, and allowed.*

And now, on this second day of November, 1892, comes the claimant by attorney and moves this honorable court to permit Eugenia R. Sweeny, as administratrix, to prosecute the case, the plaintiff, Thomas W. Sweeny, having died on April 10, 1892, and she having been duly appointed administratrix of his estate and filed in the papers of this case an exemplified copy of her letters as such administratrix.

JOSEPH W. STRYKER,
Claimant's Attorney.

Allowed:

WILLIAM A. RICHARDSON,
Chief Justice.

5 It appears of record that this cause was argued and submitted on the 18th day of May, 1893, and that on the 25th day of May, 1893, the court filed the following conclusion of law and dismissed the petition, to wit:

CONCLUSION OF LAW.

Aside from the question of the statute of limitation the court decides as a conclusion of law that the decedent did not come within the act of 1838, and the petition is hereby dismissed.

BY THE COURT.

And it further appears of record that on the 22d day of September, 1893, the claimant's attorney filed a motion for a rehearing of the case, which the court subsequently, to wit, on the 26th day of February, 1894, allowed, and that on the 29th day of March, 1894, this cause was again submitted.

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

6 III.—*Traverse. Filed March* 29, 1894.

EUGENIA R. SWEENEY, ADM'R'X OF Thomas W. Sweeney, dec'd, *v.* UNITED STATES. } No. 17404.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

J. E. DODGE,
Assistant Attorney-General.

7 IV.—*Findings of fact and conclusion of law. Filed June* 18, 1894.

This case having been heard by the Court of Claims, the court finds the facts as follows:

I.

Claimant's decedent, Thomas W. Sweeney, was mustered into the military service of the United States as second lieutenant, Mexican war, with his regiment, the Second New York Infantry, on Dec. 3, 1846.

He served therein and was paid by the United States the usual pay as a said lieutenant from November 23, 1846, to March 17, 1848.

He served from March 17, 1848, to April 10, 1892, as a commissioned officer in the U. S. Army, excepting the interval of time from December 29, 1865, to November 8, 1866.

All his service in the U. S. Army was below the grade of a general officer, except in the periods from May 12, 1861, to August 13, 1861, and from November 29, 1862, to August 24, 1865.

II.

He was a 2nd lt. of 2nd N. Y. Inf. (Mexican war), U. S. Vols., from November 23, 1846, to March 16, 1848, when he was mustered out by reason of the acceptance of an appointment as 2d lt., 2nd U. S. Inf.

He was appointed 2d lt. of U. S. Inf. March 3, '48, and accepted the appointment March 17, 1848; promoted 1st lt. June 11, 1851, capt. January 19, 1861, and major Oct. 20, 1863. On October 12, 1865,
8 Sweeny, then major of 16th Inf., applied for leave of absence for 20 days to enable him to "attend to important business." The leave was granted October 12, 1865, and expired October 31, 1865. The leave for 20 days was not extended, and there is nothing to show that his absence from Nov. 1st, 1865, to December 29, 1865, was ever viewed by the War Department as excused or unavoidable. On Dec. 29, 1865, by order of the President, he was "dismissed the service of the United States for absence without leave."

On Nov. 8, 1866, by order of the President, said order of dismissal was revoked and he was "restored to his former rank and position in the army." On Nov. 21, 1866, he was ordered to join his regiment, 16th Infantry. On Nov. 26, 1866, he was granted permission to delay joining regiment until December 15, 1866. On December 17, 1866, he was ordered to join his regiment at Savannah, Ga. On December 21, 1866, he joined his regiment for duty at Savannah, Ga., and was in command of post of Augusta, Ga., from December 25, 1866, to July, 1867. He was nominated to the Senate for confirmation of reinstatement December 12, 1866; rejected March 1, 1867; renominated March 30, 1867; again rejected April 10, 1867; again nominated April 13, 1867, and finally confirmed April 18, 1867. He was retired as brigadier-general May 11, 1870. He was paid $75, three months extra pay, under acts of July, 1848, and February 19, 1879.

III.

On February 1, 1892, he paid to the United States, upon their demand and for their use, $182.05, this sum being a balance alleged by them to be due the U. S. on a settlement of his account as an army officer, made by the Second Comptroller of the Treasury on December 24, 1891, and numbered 1050.

9 IV.

The following correspondence took place between said decedent and the defendants:

WASHINGTON, D. C., *Jan.* 4, 1892.

THOMAS W. SWEENY,
Brig. Gen'l, U. S. Army, Retired, Astoria, N. Y.:

In accordance with section 1766 of the Revised Statutes, the Second Comptroller of the Treasury reports that from settlement No. 1050, confirmed by his office Dec. 24, 1891, it appears that you are in arrears to the United States in the sum of one hundred and eighty-two and $\frac{05}{100}$ dollars ($182.05). You will therefore please turn over the above amount to a paymaster and forward his receipt to reach this office prior to February 16, 1892.

Very respectfully,

WM. SMITH,
Paymaster-General U. S. A.

That soon after the receipt by him of said communication, and upon the 1st day of February, 1892, he paid $182.05 for the use of the U. S. to a paymaster thereof and took a receipt for the same in the words and figures, as follows:

PAY DEPARTMENT, U. S. ARMY,
New York, February 1st, 1892.

Received of Brigadier-General T. W. Sweeny, U. S. A., one hundred and eighty-two dollars and fi'e cents, being on account of stoppage per letter from Paymaster-General, dated January 4, 1892. (This payment is made under protest to avoid a stoppage of his pay, General Sweeny believing himself not indebted to the United States.) Which sum I have passed to the credit of the United States and hold myself accountable therefor at the Treasury.

$182.05.

RODNEY SMITH,
Assistant Paymaster-Gen'l U. S. Army.

Statement of account in which the Department found the sum of $182.05 due from decedent, and which was paid as shown by said correspondence:

10 *Thomas W. Sweeny, Brig. Gen., U. S. A., retired, in account with the United States.*

COMPTROLLER'S STATEMENT OF ACCOUNT.

Pay, &c., of the Army, 1889, and prior years.

For overpayment of 1st add'l ration from March 3 to 16, 1853, inc		$2.80
" " " 2d add'l ration from March 1 to 16, 1858, inc		4.80
" " " pay, &c., as maj. 16th U. S. Inf., from Nov. 1 to Dec. 28, 1865, inc., net		464.00
" " " 4th add'l ration from Jan. 12 to 24, 1869, inc., net		3.70
		475.30
From which deduct short payments, as follows:		
Diff. bet. capt. and col. from Jan. 21 to 31, 1862, inc. (without forage and add'l servants)	$18.26	
Short paid servants' clothing for March, 1865, net	10.63	
Diff. bet. maj. U. S. A. and brig. genl. of vols. for August 24, 1865, net	2.45	
Pay and allowances for two servants from Oct. 20 to Dec. 31, 1869, inc., net	142.78	
Pay and allowances for two servants from Feb. 1 to March 31, 1870, inc., net	119.13	
		293.25
Balance due the United States		182.05

V.

If the decedent's service in the United States Army, within the meaning of the said longevity pay act of July 5, 1838, sec. 15, is to be reckoned only from March 17, 1848, when he began to serve as a regular, the said balance of $182.05 is correct, and this statement of account producing it is full and complete as to all items not previously properly adjusted in the whole range of the account of the decendent within the United States.

11 VI.

If, however, he is entitled to have his time of service from December 3, 1846 (the date on which he was mustered into the service of the United States as a volunteer) to March 17, 1848 (470 days), credited on the commissions afterwards held by him for the purposes of computing his longevity rations, the foregoing account should have added to its "short payments" the following sums or credits, to wit:

Statement of account.

(1) Longevity rations from Dec. 3, 1851, to March 16, 1853—470 days, at 20c.	94.00
(2) Additional longevity rations from Dec. 3, 1856, to March 16, 1858—469 days, at 30c	140.70
(3) Additional longevity rations from Dec. 3, 1861, to Nov. 28, 1862—361 days, at 30c	108.30
(4) Additional longevity rations from July 14, 1867, to July 27, 1867—14 days, at 50c	7.00
Additional longevity rations from July 28, 1867, to Jan. 24, 1869—547 days, at 30c	164.10
Making a total of	$514.10
Less internal-revenue tax	9.35
Balance due	$504.75

VII.

The said total credit of $504.75 exceeds the said balance of $182.05, and exceeds it by the sum of $322.70; and the said statement of account in Finding IV would have shown this latter sum due to the claimant from the United States, instead of showing a balance of $182.05 due to them, if the said total credit of $504.75 had been entered to the credit of the claimant thereon.

VIII.

He originally charged and was paid for his first longevity ration for five years' prior service, under the act of July 5, 1838 (5 Stat., 258),
12 only from March 3, 1853, which was five years from the date of his appointment as an officer of the United States Infantry. On his voucher for pay for September, 1855, he charged for one longevity ration for five years' prior service, for the period from December 4, 1851, to March 3, 1853, and was paid the same by the paymaster October 15, 1855. The disbursement of this longevity ration for the period from December 4, 1851, to March 3, 1853, was never approved or allowed by the accounting officers, but was disallowed by them upon the first examination of the paymaster's voucher. It was disapproved by the Paymaster-General February 20, 1856, after which the matter was referred by the Secretary of War to the Second Comptroller, who, on July 4, 1856, decided and filed a written opinion, that time spent in service as a volunteer under the act of May 13, 1846, could not be counted in the allowance of longevity rations under the act of July 5, 1838. In accordance with this decision, the voucher was disapproved by the Second Auditor, September 26, 1856, and by the Second Comptroller (when voucher came before him in due course), Nov. 3, 1856, and the amount was forthwith charged against Lieutenant Sweeny and he was required to refund it.

On August 31, 1857, he was paid the amount of the second longevity ration from Dec. 3, 1856, to August 31, 1857, and after that date he was successively paid this second ration for the respective months down to February, 1858, inclusive; but none of these payments were allowed or approved by the accounting officers, and when the vouchers came before them they were disallowed and the amounts forthwith charged against Lieutenant Sweeney, and he was required to refund them. Thereafter no payments were made to him for longevity rations based on his time of service as a volunteer under the act of May 13, 1846.

13 CONCLUSION OF LAW.

Upon the foregoing findings of fact, a majority of the court decides, as a conclusion of law, that the claimant is entitled to recover the sum of one hundred and eighty-two dollars and five cents ($182.05), that being the amount paid by claimant under protest, as shown by the findings, and for which the suit is brought; balance of said $322.70, being for longevity pay which accrued more than six years before the bringing of this suit, is barred by the statute of limitation.

BY THE COURT.

The court filed no opinion in this case.

14 V.—*Judgment of the court.*

EUGENIA R. SWEENEY, ADMINISTRATRIX OF Thomas W. Sweeney, dec'd, *vs.* THE UNITED STATES. } No. 17404.

At a Court of Claims held in the city of Washington on the 18th day of June, A. D. 1894, judgment was ordered to be entered, as follows:

The court, on due consideration of the premises, find for the claimant, and do order, adjudge, and decree that the claimant, Eugenia R. Sweeney, administratrix of Thomas W. Sweeney, deceased, do have and recover of and from the United States the sum of one hundred and eighty-two dollars and five cents ($182.$\frac{05}{100}$).

BY THE COURT.

15 VI.—*Application of defendants for and allowance of appeal.*

From the judgment rendered in the above-entitled cause on the 18th day of June, 1894, in favor of the claimant, the defendants, by their Attorney-General, on the 24th day of July, 1894, make application for, and give notice of, an appeal to the Supreme Court of the United States.

J. E. DODGE.
By JAMES H. NIXON,
Asst. Attorney.

Filed June 24, 1894.
Allowed in open court January 8, 1895.

WILLIAM A. RICHARDSON,
Chief Justice.

16 In the Court of Claims.

EUGENIA R. SWEENEY, ADMINISTRATRIX OF Thomas W. Sweeney, deceased,
vs.
THE UNITED STATES. } No. 17404.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the judgment of the court, and of the application of the defendants for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 15th day of January, 1895.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover:) Case No. 15773. Term No., 889. The United States, appellant, vs. Eugenia R. Sweeney, administratrix of Thomas W. Sweeney, deceased. Court of Claims. Filed January 16, 1895.

157-281

157-281

Office Supreme Court, U. S.
FILED.
FEB 13 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, APPELLANT,
v.
EUGENIA R. SWEENY, ADMINISTRATRIX of Thomas W. Sweeny, deceased. } No. 889.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF.

CHARLES C. BINNEY,
Assistant Attorney,
J. E. DODGE,
Assistant Attorney-General,
for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, APPELLANT,
v.
EUGENIA R. SWEENY, ADMINISTRATRIX of Thomas W. Sweeny, deceased.
No. 889.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S BRIEF.

I. STATEMENT OF THE CASE.

On December 3, 1846, the appellee's intestate, the late Gen. Thomas W. Sweeny, being at that time a second lieutenant in the Second New York Volunteers, was in that capacity mustered into the service of the United States, under the act of May 13, 1846. (9 Stat., 9.) He served in the said volunteer regiment until March 17, 1848, when, having received a commission as second lieutenant in the Second United States Infantry, he was in that capacity mustered into the regular service of the United

States. (Rec., p. 3.) After March 3, 1853, five years from the date of his commission in the Regular Army, he charged for and was paid his first longevity ration for five years' prior service. In September, 1855, he included in his account a charge for arrears of this first longevity ration for the period from December 4, 1851 (five years from his muster into the United States service as a volunteer) to March 3, 1853. The local paymaster paid this item, but it was disallowed by the War and Treasury Departments on the first examination of the voucher, the Second Comptroller rendering a decision against allowance, and the appellee's intestate was required to and did (?) refund the amount that he had received. (Rec., p. 6.) On August 31, 1857, he charged for and was paid arrears of the second longevity ration from December 3, 1856 (ten years from his muster in as a volunteer), and subsequently the same was done as to the balance of the period of ten years from his term of service as a volunteer; but these payments were disallowed in due course by the accounting officers, and the appellee's intestate was again required to refund. (Rec., p. 7.) In 1892 he was informed that an examination of his accounts showed certain overpayments to him, and also certain short payments, the deduction of which latter left a balance of $182.05 due the United States, which sum he paid under protest. (Rec., pp. 4–6.) Subsequently he began this suit to recover the sum so paid under protest, on the ground that he ought to have been credited with longevity rations due on account of his period of service as a volunteer in the Mexican War, the first two of which rations he had been

required to refund, while the last two had never been paid him. On the second trial the court entered judgment in favor of his administratrix (the claimant having died pending the suit), whereupon the United States took this appeal.

II. ASSIGNMENTS OF ERROR.

The Court of Claims erred—

1. In holding that the appellee's intestate, having been from December 3, 1846, to March 16, 1848, inclusive, an officer of a volunteer regiment, mustered into the service of the United States for a limited period, under the act of May 13, 1846 (9 Stat., 9), was entitled, during his subsequent period of service as an officer of the Regular Army, below the grade of general, to have the period of his said service as a volunteer computed as a part of his time of service "in the Army of the United States," for the purposes of the allowance of longevity rations under the act of July 5, 1838, section 15 (5 Stat., 258).

2. In holding that the appellee's intestate was entitled to have received, subsequent to the passage of the act of March 2, 1867 (14 Stat., 434), longevity rations on account of service as a volunteer during the Mexican war.

3. In holding that the United States should, in January, 1892, have set off the amounts of longevity rations, which, if due the appellee's intestate at all, were due him on and before January 24, 1869, against an unauthorized payment of his pay and allowances as major for a part of the year 1865, when he was absent without leave.

4. In entering judgment for the appellee in the sum of $182.05.

III. BRIEF OF ARGUMENT.

The principal question raised by this appeal is whether service in a volunteer regiment, mustered into the United States service under the act of May 13, 1846 (9 Stat., 9), was service "in the Army of the United States" within the meaning of section 15 of the act of July 5, 1838 (5 Stat., 258). This question can not be answered without some study of the status of volunteer forces prior to 1838, as well as of those whose services were accepted under the authority of the act of 1846. The Constitution provides that "the President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States." The object of this provision is manifestly to vest in the President the supreme command over all military forces that may be employed in the service of the United States. It does not undertake to define the precise character of the Army of the United States, nor that of the militia, though the character of the latter is to some extent defined by the section limiting the use of the militia by the United States to the execution of the laws of the Union, the suppression of insurrections, and the repelling of invasions. The small military force subject to the authority of Congress when the Constitution took effect was, by the act of September 29, 1789 (1 Stat., 95), continued in the service of the United States, but superseded by a new military establishment on the passage of the act of April 30, 1790 (1 Stat., 119). Though increased by later acts, the force was still so small that in 1798 (acts of May 28 and June 22, 1798,

1 Stat., 558, 569), a provisional army was authorized, to consist of 10,000 men enlisted for not more than three years, and also of such companies of volunteers as the President might accept, to be armed, clothed, and equipped at their own expense, and whose commissioned officers were to be appointed by the President. These volunteers could not be compelled to serve more than three months outside of their respective States. (Act of March 2, 1799, § 6, 1 Stat., 725). While these volunteers stood on a different footing from the regulars, and even from the temporary additional force provided for in the same act, yet they were in no sense State troops, the authorities of the several States having nothing to do with their organization or with the appointment and commissioning of their officers.

The acts of February 24, 1807, and February 6, 1812 (2 Stat., 419, 676), authorized the President to accept such companies of volunteers, not exceeding 30,000, as might offer themselves for the service, for the term of twelve months, unless sooner discharged, to be clothed and furnished with horses at their own expense, but armed and equipped at the expense of the United States if necessary. Their commissioned officers were to be "appointed in the manner prescribed by law in the several States and Territories to which such companies shall respectively belong," but the act of July 6, 1812 (2 Stat., 785), provided that the President should appoint and commission their officers, by and with the advice and consent of the Senate. The act of January 29, 1813 (2 Stat., 794), repealed these two acts of 1812, saving the rights of the

volunteers in service, and the act of February 24, 1814, section 18 (3 Stat., 98), empowered the President to receive into the service such of the volunteers authorized by the act of February 6, 1812, as he saw fit, provided they engaged to serve for five years or during the war, unless sooner discharged; and in that case they were to receive the same bounty, pay, rations, clothing, forage, emoluments, benefits, and allowances as the regulars, while their officers were to take rank with the other officers of the Army. The act of March 30, 1814, section 21 (3 Stat., 115), entitled the officers of such volunteers to promotion in the line of the Army. The act of January 27, 1815 (3 Stat., 193), authorized the President to accept the services of State troops, and also of volunteers, the officers of the latter to be commissioned by him; but this act was repealed a month later, on the announcement of peace.

The act of May 23, 1836 (5 Stat., 32), limited in effect to two years, authorized the President to accept the services of volunteers, not exceeding 10,000 men, to serve six or twelve months in cases of Indian hostilities, and to furnish their own clothes and horses, but to be armed and equipped at the expense of the United States, their officers to be appointed under the laws of their States or Territories. Militia companies, battalions, regiments, etc., could volunteer under this act.

A study of the various acts relating to volunteers prior to 1838 demonstrates that although these temporary additions to the national forces did not serve as militia, and hence must be regarded as a part of "the Army of the United States," as those words are used in the Constitution,

yet that those same words were also used in another and narrower sense, which did not include the volunteers. As a matter of history it is well known that the number of these early volunteer troops was very small, even in proportion to the regulars, themselves not numerous. The land forces during the war of 1812 were almost exclusively regulars and militia. The plan of raising volunteer troops did not work successfully. Under the acts of 1814 the status of volunteers seems to have differed from that of regulars only in one point, viz, that their term of service could not outlast the war, and might cease by their discharge at any time. But even in these acts, and certainly in all the others, the volunteers are treated as a separate body, distinct from the Army of the United States. In some acts they are treated as akin to the militia rather than to the Army. Thus the act of August 2, 1813 (3 Stat., 73), classes volunteers and militia together, the title using the single term "militia" to cover both, while the act of July 4, 1836 (5 Stat., 127), goes so far as to include the volunteers under the term "militia," providing that "when any officers * * * of the militia, including rangers, sea fencibles, and *volunteers* shall have died while in the service of the United States," their widows and orphans shall receive half pay. In all the statutes the volunteers are described as "volunteers" simply, or as "the volunteer corps," but never as "the volunteers of the United States Army. Under the acts of 1807, February, 1812, and 1836, the officers of the volunteers were not *de jure* officers of the United States at all, but merely State officers in the service of the United

States, for they were appointed and commissioned by State authority, and not in any of the ways provided in the Constitution for the appointment of United States officers.

As, therefore, in the half century prior to the passage of the act of July 5, 1838, the service of volunteers had rarely been authorized, and but comparatively few of them had served, as their right to bounty, clothing, etc., had differed more or less from that of the regulars, and as they had evidently been always regarded as bodies accessory to the United States Army proper, but not a part of it, it is but reasonable to conclude that when Congress, in section 15 of that act, provided that certain commissioned officers should receive an additional ration per diem for every five years they had served or should serve "in the Army of the United States," it used those words to mean the Regular Army, in which alone these officers were commissioned, and the increase and regulation of which were the objects of this particular statute. The correctness of this conclusion is evidenced by the single reference which the act makes to volunteers, in section 25, where they are classed with the militia, showing that they were regarded as partaking more of the character of militia than of that "Army of the United States" with which the statute almost exclusively dealt.

The volunteers, whose services the act of May 13, 1846, authorized the President to call for and accept, were to serve for twelve months, or to the end of the war, unless sooner discharged, and were to furnish their own clothes, horses, and horse equipments, but, when mustered into service, to be armed at the expense of the United States.

Their officers were to be "appointed in the manner prescribed by law in the several States and Territories" to which the respective regiments or other bodies belonged, and the staff, field, and general officers were to be apportioned among the respective States and Territories from which the volunteers tendered their services. Sections 4 and 9 expressly distinguish these volunteers from "the Army of the United States." The former provides that the volunteers, when called into actual service, and while remaining therein, "shall be in all respects, except as to clothing and pay, placed on the same footing with similar corps of the United States Army." This means that the volunteer cavalry shall be on the same footing with the cavalry of the United States Army, the volunteer artillery on the same footing with the artillery, etc., but the section, while assimilating the volunteers to the "United States Army" in certain respects, treats the two bodies as essentially distinct. The ninth section provides that the volunteers when in service "shall have the organization of the Army of the United States, and shall have the same pay and allowances." This provision makes a further assimilation of the two bodies, yet preserves the distinction between them. The same provision is made for the militia, with whom, for the purposes of this section, the volunteers are classed, and it is obvious that, although the volunteers and militia were distinct from each other, Congress regarded them as alike in the feature of being outside "the Army of the United States." It is to be observed too that all through the act, the volunteers, like the militia, are referred to as being in "the

service" of the United States, never in "the Army." Had Congress ever intended that these volunteers should be temporarily received into and become a part of the Army of the United States, it would have been very easy so to provide; but when, instead of any such provision, a distinction between the volunteers and the Army is carefully and repeatedly marked by the language used, it must be inferred that a real separation was intended.

The meaning attached by Congress to the words "the Army of the United States" is further shown by the very next statute, approved the same day as that authorizing the service of volunteers. The words "the rank and file of the Army of the United States" are used in the title of this next act as equivalent to the words in the body of the act, "the companies of the existing regiments of dragoons, artillery, and infantry," words which could not possibly apply to any force except the Regular Army.

It is a matter of history that after the civil war a large number of volunteer officers received commissions in the Regular Army, and in recognition of their prior services the act of March 2, 1867, section 1 (14 Stat. 434), provided that—

> In computing the length of service of any officer of the Army, in order to determine what allowance and payment of additional or longevity rations he is entitled to, * * * there shall be taken into account and credited to such officer whatever time he may have actually served, whether continuously or at different periods, as a commissioned officer of the United States, either in the Regular Army, or, since the 19th day of April, 1861, in the volunteer service. * * *

This act bears upon the present case in two respects: First, it designates only two kinds of service (in the Regular Army or as a volunteer since 1861) as entitling an officer to longevity rations, and hence positively excludes service as a volunteer under the act of 1846. *Expressio unius est exclusio alterius.*

Second, it tacitly admits that service in the volunteer forces could not, before that time, have been regarded as service "in the Army of the United States" under section 15 of the act of July 5, 1838, for otherwise no new statutory provision would have been necessary.

The construction of the act of 1838, which the act of 1867 tacitly admits to have been correct, is that which has always prevailed in the War and Treasury Departments, and the appellee's intestate seems to have been the only person, except a paymaster or two, who has put himself on record as disputing the official construction. He did not, indeed, do so at first, for he claimed no longevity rations until after March 3, 1853, five years from the date of his commission in the Regular Army. That he was paid it from that date, instead of from March 17, 1853, five years from his actual muster into the Army, was a trifling error which escaped notice at the time. Two years and a half later, in September, 1855, the idea seems to have come to him that his service as a volunteer should be taken as a part of his first five years' service in the Army, and he presented an account for arrears of longevity ration from December 4, 1851, to March 2, 1853, inclusive. The local paymaster paid the account, but the voucher was disapproved by the Paymaster-General

as soon as it came before him, and the matter being referred by the Secretary of War to the Second Comptrollor, a decision was rendered which thereafter became the rule of the office. Lieutenant Sweeny was then required to refund the longevity ration for the whole period prior to March 3, 1853. In 1857, the year after the adverse decision, he charged for and was paid arrears of the second longevity ration computed from December 4, 1856, but when the vouchers for this and subsequent payments came before the accounting officers they were disallowed as in the prior instance, and he was again required to refund. Thereafter, and until the bringing of this suit, he did not attempt to break through the ruling of the Treasury. It is submitted there is sufficient evidence of contemporaneous and uniform official construction to bring the case within the rule of this court as stated in *Brown* v. *United States* (113 U. S., 568), and *The Laura* (114 *id.*, 411), and that the official construction of the acts of 1838 and 1846, a construction established when the first case came before the accounting officers, should not now be set aside after it has stood for nearly thirty-nine years.

It is therefore submitted that, as the circumstances and the legislation prior to the act of 1838, the language of the act of 1846, the contemporaneous and unbroken official construction of the former act in connection with the latter, and the plain language of the act of 1867, all negative the idea that service "in the Army of the United States," as those words are used in the act of 1838, includes service in the volunteer forces whose service was authorized by the act of 1846, the court should so decide, and sustain the appeal.

The counsel for the appellee calls attention (brief, p. 3) to the fact that section 9 of the act of 1846 provides that the volunteers, whenever called and received into the service of the United States under that act, "shall have the organization of the Army of the United States, and shall have the same pay and allowances," and he seeks to draw therefrom an inference in support of the judgment of the Court of Claims. It has already been pointed out that this provision, so far from warranting that inference, distinguishes the volunteers from the Army and classes the former with the militia. The counsel can not seriously contend that the militia, while serving under the authority of the United States in Texas, or even in Mexico itself for the purpose of more effectually repelling an invasion of the United States, were a part of "the Army of the United States," and yet every provision of this section 9, on which the appellee's counsel relies, applies to the militia as well as to the volunteers. Moreover, the meaning of the words "organization," and "pay and allowances," in this act of 1846, is necessarily limited to the objects of the act. The volunteers were to serve until the end of the war, unless sooner discharged; and no provision whatever was made for their remaining in the service after the close of the war. Hence it is manifest that Congress intended their "organization" to last during that period only, and their "pay and allowances" to continue for the same length of time and no longer.

In the appellee's brief, page 4, it is insisted that the appellee's intestate, having been in the service of the United States in Mexico, must have been in "the Army

of the United States," within the meaning of the act of 1838. It has already been pointed out that the Constitution does not define either "the Army of the United States" or the militia, and that in several acts, including those of 1838 and 1846, now under review, Congress has treated the volunteers as a species of militia rather than as a part of "the Army;" but even if it be admitted that the volunteers of 1846 were a part of "the Army of the United States" as that term is used in the Constitution, that is a very different thing from regarding them as a part of "the Army of the United States" within the meaning of the act of 1838, those words being, as has been shown above, evidently limited to the Regular Army in that act, whether the same words are so limited in the Constitution or not.

That the enormous volunteer force called into service during the civil war was in many respects treated by Congress as a part of the Army of the United States is admitted, but the present case involves the status of that comparatively small body, the Mexican war volunteers, and to cite the opinions of the Judge-Advocate-General in regard to the civil war volunteers, as is done in the appellee's brief, is merely to darken counsel.

Equally irrelevant is the citation (appellee's brief, pp. 4-5) of the Judge-Advocate-General's opinion as to the effect of service "as a commissioned officer of the United States" in the volunteer force during the Mexican war, upon rank as between officers of the same grade and date of commission. In the first place, this opinion is expressly based upon the broad language of Revised Statutes, sec-

tion 1219, which differs entirely from that of the first section of the act of March 2, 1867, cited above, concerning longevity rations, so that the opinion can not possibly be regarded as affecting the meaning of the latter section. In the second place, while section 1219 does, indeed, treat service during the civil war under a commission from a governor as equivalent to service "as a commissioned officer of the United States," it does not so treat service in the Mexican war, and the Judge-Advocate-General does not hold that the latter should be so treated. He holds that one who has been "a commissioned officer of the United States" (commissioned, that is to say, as the Constitution requires such officers to be commissioned) in the volunteer force during the Mexican war is within the section. There were such commissioned officers, for the act of March 3, 1847, section 3 (9 Stat., 184), authorized the President to commission officers of volunteers on their reenlistment, but it has not been found that the appellee's intestate was one of these. His service as a commissioned officer of the United States is expressly stated to have begun on March 17, 1848, and hence the Judge-Advocate-General's opinion does not refer to such a case as his.

In regard to the second assignment of error it is only necessary to point out that the Court of Claims has overlooked the effect of the act of March 2, 1867, section 1, not only as recognizing that no period of volunteer service could previously have been computed in the allowance of longevity rations under the act of 1838, but also in restricting to service since April 19, 1861, only, the privileges granted by that section to volunteer service.

The conclusion of law, recognizing as it does the existence of a balance of $322.70, though the claim therefor is barred by the statute of limitations, shows that the court has fallen into the second error as well as the first, although, owing to the effect of the statute of limitations, the amount of the judgment is not changed thereby.

It is to be observed that the charges against the appellee's intestate in the Comptroller's statement of January, 1892 (Rec., p. 5), are of two kinds, viz, longevity rations overpaid, $11.60, and pay as major overpaid, $464. Even conceding that the longevity rations based upon Mexican war volunteer service ought to have been allowed, this would only affect the sum of $11.60, for the appellee can not by this suit compel the United States to credit her with the amounts due her intestate for such rations, because his claim for them was barred by the statute of limitations before this suit was brought, the very last ration of that character being that which is claimed to have been due for January 24, 1869. A debt barred by the statute of limitations can not, except in Indiana, be the subject of a set-off (see Set-off, 22 Am. and Eng. Cyc. of Law, 209, 271); and hence it can not form the basis of a claim for money paid under a protest which can only be justified by the existence of a legal set-off.

It is true that the items charged against General Sweeny, and on account of which he was required to pay the sum for which this suit was brought, were also more than six years old when the account was made up, but *nullum tempus occurrit reipublicæ*. It is also true that in stating that account he was credited with short payments due for

more than six years, but the United States was not required even to allow any of those credits, and the action of its officers in so doing, though in the interest of absolute justice, was an act of grace rather than of right. Certainly it is not compellable to add any further credits, similarly barred in law, to those already allowed. The present case is within the exception mentioned in *United States* v. *Clark* (96 U. S., 37, 43). It was there stated to be "a principle of general application, that so long as a party who has a cause of action delays to enforce it in a legal tribunal, so long will any legal defense to that action be protected from the bar of the lapse of time, *provided it is not a cross demand in the nature of an independent cause of action.*"

Now General Sweeny's right to receive longevity rations on account of volunteer service, if such existed, had nothing to do with the fact that certain pay had been allowed him for a period when he, then a major, was absent without leave. The cause of action which he had against the United States was wholly independent of its cause of action against him, and the former being barred he could not require it to be set off.

The reason for the exception is obvious. A defense can not be availed of till some action is taken against the party who relies on such defense, but a cross-demand—an independent cause of action—can be maintained at any time, and it is the party's own fault if he has not done so before such cause of action became barred by lapse of time. If General Sweeny ever had any legal right to sue for the longevity rations now claimed to have been due him, he

should have brought his suit within the proper time, and he alone is to blame if the United States, seeing his long acquiescence in the nonallowance of such rations, refuse now to allow them as credits.

As to the first and second longevity rations (those claimed to be due from December 3, 1851, and December 3, 1856, respectively) it is clear that no claim can, in any view of the law, be based upon them, because General Sweeny was paid them once, and then required to refund them, and, there being no evidence of any protest on his part, the money so repaid can not possibly be the subject of any claim by him, even indirectly.

For all these reasons, therefore, and chiefly because it seems clear that the act of 1838, in providing for longevity rations, did not include such volunteer service as was performed under the act of 1846, as service "in the Army of the United States," the appellant submits that the judgment of the Court of Claims should be reversed.

CHARLES C. BINNEY,
Assistant Attorney,
J. E. DODGE,
Assistant Attorney-General,
for Appellant.

157-281

157-281

Office Supreme Court, U. S.
FILED.
FEB 6 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1894.

THE UNITED STATES, Appellant,

vs.

EUGENIA R. SWEENY, Administratrix of THOMAS W. SWEENY, deceased.

No. 889.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF JOSEPH W. STRYKER,
Attorney for Appellee.

MILANS, LAW PRINTER, 615 E STREET, N. W., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, *Appellant*,
vs.
EUGENIA R. SWEENY, ADMINISTRATRIX OF THOMAS W. SWEENY, DECEASED.
No. 889.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF JOSEPH W. STRYKER, *Attorney for Appellee.*

STATEMENT OF THE CASE.

On December 24, 1891, the Second Comptroller of the Treasury confirmed a statement of account, No. 1050, of "Thomas W. Sweeny, Brig. Gen., U. S. A. retired, in account with the United States," which found him in arrears to them in the sum of $182.05. (Record p. 5.) To avoid a stoppage of his pay, as a said officer, he on their demand, and under protest handed over this sum to them upon the first day of February 1892 (Record pp. 1, 4, 5). Next, he, believing that this statement of account was made in error and that in fact no arrears or balance then existed on his account with the United States and that consequently this sum, of $182.05, was

money had and received by them without any consideration whatever moving from them to him therefor, brought this suit in the U. S. Court of Claims, on February 23, 1892, to recover the same. (Record pp. 1, 2). And, next, General Sweeny having died on April 10, 1892, Eugenia R. Sweeny was permitted, as his administratrix, to prosecute this suit; and the Court of Claims rendered her a judgment according to her demand for $182.05, from which the United States have taken an appeal to this Court. (Record, pp. 2, 7.)

ARGUMENT.

The Court of Claims filed no opinion in this case (Record, p. 7): Looking, however, at the findings, V, VI, and VII, (Record, pp. 5, 6,) we are inevitably left to conclude their Honors have viewed it good basis for the judgment that the settlement, No. 1050, should have given an additional credit to Gen. Sweeny of $504.75, which sum this finding, VI, says he is entitled to, if his time of 470 days' service in the Mexican War is computable to him for longevity rations.

It is submitted this obvious view of their Honors is entirely correct: For if this settlement, No. 1050, otherwise found to be as a statement of differences, full and accurate (in said finding V), should give Gen. Sweeny this additional credit of $504.75, or even $182.05 thereof, it shows *no* balance due to the United States, and Gen. Sweeny having made, in the Court of Claims, his demand for this sum within six (6) years from the time he paid it to them—to extinguish the consequent non-existing balance—he is certainly entitled to the judgment he has there obtained.

Therefore the only question to be considered, in order to determine whether this judgment shall here be affirmed

or not, is merely whether Gen. Sweeny is entitled, or not, to have his time of 470 days' service in the Mexican War computed in reckoning the longevity rations accruing to him for length of service while he thereafter served holding a commission in the U. S. Army.

The appellee contends that he is so entitled.

The law which fixes the additional rations or the increase of compensation to be then allowed to him for length of service is plain and unambiguous, and is found in Section 15, of the Act of July 5, 1838 (5 Stats. 258) reading as follows:

"That every commissioned officer of the line or staff, exclusive of general officers, shall be entitled to receive one additional ration per diem for every five years he may have served or shall serve in the Army of the United States."

General Sweeny served the said 470 days, viz; from December 3, 1846, to March 17, 1848, then being a U. S. Volunteer commissioned officer, mustered into the Military Service of the United States (Record, p. 3.)

The appellant may contend that the words in this Section, 15, "every five years he may have served," include only time served as a Regular, so called; but there is no such restriction in the language, and it is not to be implied; further if it is to be implied, the implication is wiped out by section 9, of the Act of May 13, 1846, (9 Stats. 9) which says that Volunteers in the Mexican War, "shall have the organization of the Army of the United States and the same pay and allowances". This expressly shows an intention of Congress to make time of service in the Mexican War as a Volunteer, as beneficial to an officer, for all purposes of pay, as if it were time of service as a Regular.

It is immaterial whether Gen. Sweeny then served as a Volunteer, or Regular, so called. The sole question is, did he serve in the Mexican War, "in the Army of the United States?"

If the appellant contends that he did not, suggestions will be very acceptable as to what Army, if any, Gen. Sweeny did then serve in; or as to how he was then legitimately sent out there as a warrior against Mexico?

Article II, Section 2, of the Constitution, reads:

"The President shall be Commander-in-Chief of the Army * * of the United States;"

And it cannot be doubted that *in virtue of this language* in the Constitution the President was Gen. (then Lt.) Sweeny's Commander-in-Chief when he was out in Mexico; or that these same words, "the Army of the United States," are used in said Section 15, of the Act of July 5, 1838, just as they are used in the Constitution.

Winthrop's Digest of Opinions of the Judge Advocate-General only elaborates these same views when it says, on page 478, and citing several authorities, viz:

"The volunteer force during the late war was not a part of the Militia, but of *the Army of the United States*. Though assimilated to the Militia in some respects, as, for example, in the mode of original appointment of regimental and company officers, it was as distinct *in law* from the Militia as was the so-called "regular" contingent of the Army. Volunteer officers, once mustered into the service of the United States, and while they remained in that service, did not differ substantially from regular officers in their status, rights, or otherwise."

This same authority holds that in fixing *rank*, a more delicate matter than pay, and in fixing it even after March 2, 1867, the same rule obtains: It reads, on pages 410 and 411, as follows:

"*Held* that, in fixing his rank in relation to another officer of the same grade and date of commission under Section 1219, of the U. S. Revised Statutes, an officer was entitled to have taken into account a period of service rendered by him "as a commissioned officer of the United States" in the volunteer force during the Mexican War; the provision of the second sentence of the Section not being viewed as limiting the application of the general and comprehensive provision of the first sentence":

It may be remarked that this view seems necessary to harmonize the said Sec. 1219, (taken from the Act of March 2, 1867, 14 Stats. 434) with the 123d Article of War (taken from the Act of March 2, 1867, 14 Stats. 434 and contained in Sec. 1342, U. S. Rev. Stats.) reading;

"In all matters relating to the rank, duties, and rights of officers, the same rules shall apply to officers of the regular army and to volunteers commissioned in, or mustered into said service, under the laws of the United States, for a limited period;"

and that it controverts the contention of the appellant (set up in the Court below) that the following language (of the Act of March 2, 1867, 14 Stats., 434) viz:

"In computing the length of service of any officer of the Army, in order to determine what allowance and payment of additional or longevity rations he is entitled to, and also in fixing the relative rank to be given to an officer as between himself and others having the same grade and date of appointment and commission, there shall be taken into account and credited to such officer, whatever time he may have actually served, whether continuously or at different periods, as a commissioned officer of the United States, either in the regular Army, or, since the nineteenth day of April, 1861 in the volunteer service,"

excludes, by implication, the time of service of Gen. Sweeny as a volunteer in the Mexican War from being

credited to him for purposes of longevity rations, after this act took effect—on its date of March 2, 1867.

This Act, of March 2, 1867, is merely affirmative without any negative terms in it repealing any prior law, and if (thus) it does not forbid an officer to continue to count his time of service prior to April 19, 1861, for purposes of *rank*, it cannot forbid him to continue to count (as authorized by prior law) such prior time of service for purposes of *pay*: Moreover it is to be noted that the "statement of account," on page 6, of the Record, gives to Gen. Sweeny a credit of more than $182.05, of longevity rations, as accuring to him, in virture of his Mexican War time of service, *before* the second day of March, 1867.

Therefore it is solely the judicial view this Court is called upon to take of Gen. Sweeny's rights to longevity rations, under the said Sec. 15, of the Act. of July 5, 1838, which must now determine the point at issue; And the appellee submits that the judgment of the Court of Claims should be affirmed.

JOSEPH W. STRYKER,
Attorney for Appellee.